STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN KEVIN BALLARD,

Defendant-Appellant.

UNPUBLISHED
February 28, 2003

No. 225560
Macomb Circuit Court
LC No. 98-001651-FC

Before: Jansen, P.J. and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced to 2-1/2 to 20 years' imprisonment. He appeals as of right. We reverse and remand for a new trial.

Defendant's conviction arises out of robbery of Richard Smith, the manager of a McDonalds restaurant, on February 11, 1998. Smith testified that he drove to the Comerica bank branch at Twelve Mile and Ryan in Warren to deposit the day's earnings from the restaurant. After parking at the curb, Smith took the bag with the day's earnings and headed for the after-hours drop box As he approached the drop box, Smith noticed a green Neon drive up in front of his car. A man with a bandana tied across the lower part of his face pulled out a handgun and walked toward Smith and said "give it." Smith threw the bag to the ground and watched as the robber opened the bag and examined its contents. According to Smith, he was able to observe that the robber was a black male with a stocky build, wearing black clothes and a bandana across his face. The robber then got into the passenger side of the Neon, and the car drove off.

Smith wrote down the license plate number of the car and reported the robbery to the Warren Police Department. Although Smith looked through a book of mug shots, he did not recognize anyone as the robber. However, Detective Pierog of the Warren Police Department ran a LIEN check on the license plate number and learned that the vehicle used in the robbery had been stolen in Troy two weeks previously.

Thereafter, on February 24, 1998, patrol officers with the Detroit Police Department spotted the Neon and gave chase. The police, however, were unable to apprehend the men inside the car, who abandoned the vehicle and fled. Subsequently, Keith Keitz, an evidence technician with the Warren Police Department, found a latent print on the passenger side of the rearview mirror, which Chris Dyke, an evidence technician, identified as defendant's. In the meantime,

Detective Pierog determined that defendant was a suspect in the robbery because he lived near the location where the vehicle was recovered and because there were other charges pending against him. At Detective Pierog's request, the Hazel Park Police Department prepared a photographic array with defendant's photo and five others. On March 25, 1999, the victim viewed the photo lineup and selected defendant's photo, claiming that he recognized defendant's eyes.

Defendant was arrested on April 16, 1998, but denied any involvement in the robbery when interrogated by Detective Pierog. According to defendant, he was watching his nephew at the time of the robbery on February 11, 1998. However, defendant could not corroborate his alibi. When Detective Pierog told defendant that a witness had identified him as the robber, defendant replied, "how could they identify me, I had a mask on." Defendant's response surprised Detective Pierog because he had not mentioned to defendant that the robber wore a mask. After thinking for a minute, defendant then said, "Oh, it must have been those other detectives that mentioned that I had a mask on." When Detective Pierog informed defendant that the fingerprint technician could neither confirm nor deny that a latent fingerprint inside the car was his, defendant replied, "Hey, look, I wasn't the driver. If you've got the prints there it's not mine." Detective Pierog then informed defendant that the latent fingerprint had been taken from the passenger's side of the rearview mirror.

Defendant was charged by information with armed robbery and felony-firearm. Following a jury trial, defendant was found guilty of armed robbery, but acquitted of the felony-firearm charge.

On appeal, defendant argues that he was denied the effective assistance of counsel when trial counsel failed to object to testimony by the prosecution's fingerprint expert, Chris Dyke, that she was "ninety-nine percent" certain that a latent fingerprint from the car used in the robbery was defendant's, even though there was no scientific foundation for this personal opinion. We agree.

A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In this case, defendant preserved the issue by moving for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Following the *Ginther* hearing, the trial court denied defendant's motion for a new trial, finding that trial counsel did not err by failing to object to the testimony that "there is a 99 percent certainty that is – that it is the defendant's print."

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600, 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

In this case, we believe that trial counsel's failure to object to the challenged testimony was so unreasonable under professional norms that he was not acting as the counsel guaranteed by the constitution. *Carbin, supra* at 600.

MRE 702, which governs the admissibility of expert testimony, provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In Michigan, courts apply the *Davis-Frye* test, derived from *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States*, 54 App DC 46; 293 F 1013 (1923), to determine what is "recognized scientific, technical, or other specialized knowledge."[1] *Anton v State Farm*, 238 Mich App 673, 678; 607 NW2d 123 (1999). This Court stated in *Anton*:

> Pursuant to MRE 702, the *Davis-Frye* rule limits the admissibility of novel scientific evidence by requiring the party offering such evidence to demonstrate that it has gained general acceptance in the scientific community. *People v McMillan*, 213 Mich App 134, 136; 539 NW2d 553 (1995); *People v Haywood*, 209 Mich App 217, 221; 530 NW2d 497 (1995). In conducting a *Davis-Frye* inquiry, a trial court is not concerned with the ultimate conclusion of an expert, but rather with the method, process, or basis for the expert's conclusion and whether it is generally accepted or recognized. . . . The party offering the evidence has the burden of demonstrating its acceptance in the scientific community. [*Id.* at 678-679.]

In *Nelson v American Sterilizer (On Remand)*, 223 Mich App 485; 566 NW2d 671 (1997), this Court further explored the requirement in MRE 702 that the subject of an expert's testimony be restricted to "recognized scientific . . . knowledge." *Id.* at 491. The Court stated:

> We conclude that MRE 702 requires a trial court to determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted. To determine whether the requisite standard of reliability has been met, the court must determine whether the proposed testimony is derived from "recognized scientific

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[1] In *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 588-589; 113 S Ct 2786; 125 L Ed 2d 469 (1993), the United States Supreme Court concluded that the *Frye* test had been superseded by FRE 702. The *Daubert* Court rejected the requirement that scientific evidence be generally accepted in the scientific community as an "absolute prerequisite to admissibility." *Id.* at 588. Instead, the *Daubert* Court adopted a flexible test for determining whether scientific evidence is reliable, i.e., that it be rooted in scientific methodology. *Id.* at 593. The Michigan Supreme Court has not yet determined that *Daubert* applies in Michigan as well. This Court has expressed doubt that the *Daubert* analysis is consistent with the language of MRE 702. *Anton v State Farm*, 238 Mich App 673, 679 n 3; 607 NW2d 123 (1999).

> knowledge." To be derived from recognized scientific knowledge, the proposed testimony must contain inferences or assertions, the source of which rests in an application of scientific methods. Additionally, the inferences or assertions must be supported by appropriate objective and independent validation based on what is known, e.g., scientific and medical literature. This is not to say, however, that the subject of the scientific testimony must be known to a certainty. *Daubert, supra* at 590.[2] As long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel. [*Id.*, 491-492.]

As defendant correctly points out, there was no scientific foundation laid for Ms. Dyke's testimony that she was "99 percent" certain that defendant's fingerprint was found in the stolen car. Specifically, the challenged testimony had no demonstrated basis in an established scientific discipline and rested solely upon Ms. Dyke's personal opinion. Here, trial counsel's failure to object to Ms. Dyke's testimony was objectively unreasonable because the testimony was not admissible under MRE 702 since it did not come from a recognized scientific discipline. See *People v Beckley*, 434 Mich 691, 710-711 (1990).

Trial counsel's error also prejudiced defendant because there was a "reasonable probability" that the result of the trial would have been different absent the error. Specifically, trial counsel's error was outcome determinative, given that the only other evidence that defendant committed the robbery was Smith's testimony that he recognized defendant based on his eyes and Detective Pierog's testimony that defendant gave an uncorroborated alibi and he somehow knew that the robber had worn a mask. While this testimony may have been sufficient to convict defendant of armed robbery, it was subject to reasonable doubt. In particular, Smith's identification testimony was open to serious doubt. Viewed in the context of this case, it is thus reasonably likely that Dyke's purportedly scientific testimony that she was 99% certain that defendant's fingerprint was found in the car affected the outcome of the case since it effectively removed any reasonable doubts that the jurors might have harbored about defendant's guilt. For that reason, we conclude that trial counsel's error in failing to object to the expert's inadmissible testimony constituted ineffective assistance of counsel. In so concluding, we need not address defendant's contention that trial counsel's failure to seek an independent examination of the fingerprint evidence deprived him of the effective assistance of counsel.

Accordingly, we reverse defendant's conviction and remand for a new trial. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

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[2] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).